



Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
T +1 202 637 5600
F +1 202 637 5910
www.hoganlovells.com

July 12, 2016

VIA ELECTRONIC DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TWA325
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation
CG Docket No. 02-278**

Dear Ms. Dortch:

On July 8, 2016, the following individuals met with Diane Cornell, Special Counsel to Federal Communications Commission ("FCC" or "Commission") Chairman Wheeler, and Chavez Adams and Amber Lucci from Chairman Wheeler's Office, on behalf of Navient Corp. ("Navient"): Sarah Ducich, Senior Vice President of Government Relations and Public Policy, Navient; Lucia Lebens, Vice President of Government Relations and Public Policy, Navient; Joel Mayer, Managing Director and Associate General Counsel, Navient; and Mark W. Brennan and Wesley B. Platt of Hogan Lovells US LLP, counsel to Navient. At the meeting, we discussed the FCC's proposals for implementing Section 301 of the Bipartisan Budget Act of 2015,¹ which exempts calls to wireless numbers that are made "solely to collect a debt owed to or guaranteed by the United States" from the Telephone Consumer Protection Act's ("TCPA") technology-based "prior express consent" requirement.²

During the meeting, we discussed the ample evidence in the record that the NPRM's proposal to limit the number of calls allowed under the exemption to three per month is unduly restrictive and would conflict with many other regulatory requirements.³ For example, as many commenters point out, the Department of Education ("Department") and other federal agencies

¹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, 31 FCC Rcd 5134 (2016) ("NPRM"); Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a)(2)(H), 129 Stat. 584 (2015).

² See 47 U.S.C. § 227(b)(1). All of the comments and reply comments referenced in this letter were filed in CG Docket No. 02-278 in June 2016.

³ See, e.g., Navient Comments at vii, 41-15; Navient Reply Comments at iv, 4-7; Am. Assoc. of Community Colleges Comments at 2 ("[T]hree call attempts per month is not sufficient to assist borrowers.").

require more than three calls per month to certain borrowers.⁴ Attached as Appendix A to this letter is an overview of federal and state government requirements for calls to borrowers that have been cited in this proceeding. Accordingly, we agree with the Consumer Financial Protection Bureau (“CFPB”) that a “careful assessment” is needed to determine an optimal limit on the number of calls allowed under the exemption.⁵ We also agree with the Department that the NPRM’s proposed limit “would not afford borrowers sufficient opportunity to be presented with options to establish more reasonable payment amounts and avoid default, especially given that the proposal limits the number of initiated calls, even if the calls go unanswered.”⁶

Based on the record, the Commission should consider adopting a limit of three calls per week. Parties have expressed a range of views on this issue,⁷ and a three-call-per-week limit represents a reasonable compromise that appropriately balances the varying interests in this proceeding. Such a limit is also supported by data in the record. For example, we explained in our comments that 25 percent of federal student loan borrowers require 40 or more call attempts to reach,⁸ and Nelnet showed that calling up to ten times per month leads to 42 percent more live contacts compared to calling three times per month.⁹ Meanwhile, the National Council of Higher Education Resources’ recent survey demonstrates that traditional methods of contact – landline calls and traditional mail – are not effective means of communicating with the most at-risk federal student loan borrowers.¹⁰ Moreover, a limit of three calls per week would give callers the flexibility they need to comply with other federal agencies’ requirements. And this limit is consistent with proposals from consumer organizations, such as the National Consumer Law Center, in the CFPB’s debt collection proceeding.¹¹

During the meeting, we also discussed the near-universal agreement on several key issues in this proceeding. For example, nearly all commenters support the NPRM’s proposal to interpret the exemption to cover debt servicing calls.¹² Such calls are critical to keeping student loan

⁴ See, e.g., Am. Bankers Ass’n and Consumer Bankers Ass’n Comments at 11; Consumer Mortgage Coalition Comments at 5-10; see also Letter from Mark W. Brennan, Counsel, Navient Corp., to Marlene H. Dortch, Secretary, FCC, CG Docket No-02-278, App. A (June 30, 2016) (providing an overview of federal and state government regulations that require calls to borrowers and have been cited by commenters in this proceeding).

⁵ See CFPB Comments at 10.

⁶ See Letter from Ted Mitchell, Undersecretary, the Department, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 4 (July 11, 2016).

⁷ Compare, e.g., National Consumer Law Center Comments at 24-27 (supporting a limit of three calls per month), with Education Finance Council Comments at 7-8 (proposing a limit of three call attempts per day or nine call attempts per seven-day period).

⁸ See Navient Comments at 42-43.

⁹ See Nelnet Comments at 14.

¹⁰ See Letter from James P. Bergeron, President, National Council of Higher Education Resources (“NCHER”), to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 16-18 (July 11, 2016).

¹¹ April Kuehnhoff and Margot Saunders, *National Consumer Law Center, Debt Collection Communications: Protecting Consumers in the Digital Age* at 4 (June 2015), available at <http://bit.ly/1LQxpDK>.

¹² See NPRM ¶¶ 8-10; see also, e.g., NCHER Comments at 4-5; Educ. Credit Management Corp. Comments at 3-5; Credit Union Ass’n of the Dakotas Comments at 3.

borrowers on track and aware of their repayment options.¹³ Often, they are a vital pathway for providing information to an at-risk or struggling borrower.¹⁴

The vast majority of commenters also agree that the exemption should cover calls prior to delinquency. State agencies,¹⁵ nonprofit organizations,¹⁶ education associations,¹⁷ and student loan servicers¹⁸ all agree that the exemption properly includes such calls. As many commenters emphasize, the exemption applies based on the purpose of the calls, not the level of delinquency.¹⁹ Moreover, such calls can be instrumental in helping student loan borrowers avoid delinquency – as highlighted by the Department’s federal student loan requirements and the Interagency Task Force’s recommendations to President Obama last year.²⁰ The National Consumer Law Center (“NCLC”), *et al.* also note that they have “been persuaded” since the NPRM’s release that the exemption should cover certain pre-delinquency calls.²¹

Likewise, many commenters agree that the exemption should cover calls to numbers other than those provided by borrowers, as reflected by the comments of the Association of Community College Trustees,²² the National Association of College and University Business Officers,²³ ACA International,²⁴ NCLC,²⁵ and the Student Loan Servicing Alliance.²⁶ Such calls are made “solely to collect” a federal debt. Additionally, they are often a critical tool for locating federal student loan borrowers.²⁷ In some cases, the Department’s rules even require skip-tracing and contacting individuals other than the borrower.²⁸

The record demonstrates that low-income and minority federal student loan borrowers – who are at a greater risk of default – are far more likely to be able to be reached only on a wireless phone. As the American Association of Community Colleges explains, “[d]espite the relatively low

¹³ See *id.*

¹⁴ See Educ. Finance Council Comments at 1.

¹⁵ See, e.g., Utah Higher Educ. Reply Comments at 1.

¹⁶ See, e.g., United Negro College Fund (“UNCF”) Comments at 2 (“[W]e recommend that the [FCC] permit the use of auto dialer technology to be used by loan servicers to contact borrowers to advise them of their repayment options, even if their loans are in good repayment status.”); Vermont Student Assistance Corp. Reply Comments at 1.

¹⁷ See, e.g., Am. Ass’n of Community Colleges Comments at 2.

¹⁸ See, e.g., Navient Comments at 30-35; Continental Service Group d/b/a ConServe Comments at 4-5 (“ConServe Comments”).

¹⁹ See, e.g., Navient Comments at vi, 37, 40; ConServe Comments at 5-6.

²⁰ See, e.g., Navient Comments at 31-32; 34 C.F.R. § 682.411; U.S. Dep’t of Educ., *Recommendations on Best Practices in Performance-Based Contracting* at 10 (2015), <https://www2.ed.gov/finaid/loans/repay/best-practices-recommendations.pdf>.

²¹ See NCLC Reply Comments at 6-7.

²² See Ass’n of Community College Trustees Reply Comments at 4.

²³ See Nat’l Ass’n of College and University Business Officers Reply Comments at 4.

²⁴ See ACA Int’l Comments at 11.

²⁵ See NCLC Reply Comments at 9.

²⁶ See Student Loan Servicing Alliance Comments at 20.

²⁷ See, e.g., Navient Reply Comments at 23.

²⁸ See 34 C.F.R. § 682.411(h), (m).

borrowing rate (19%) compared to their four-year college counterparts, community college students struggle with persistently high default rates.”²⁹ The United Negro College Fund (“UNCF”) echoes these sentiments. UNCF explains that “[b]ecause African Americans have fewer financial resources, they borrow at higher rates, and in greater amounts, than White Americans to attend colleges.”³⁰ UNCF also notes that “[t]oo many federal student loan borrowers are hampered in paying their loan debt because they must navigate a confusing array of [r]epayment options that they do not understand or they simply are not aware of.”³¹

Although low-income and minority student loan borrowers often stand to benefit most from conversations with their servicers, reaching them other than by wireless phones can prove challenging. For example, such borrowers are disproportionately wireless-only.³² They also move more frequently and tend to change telephone numbers more often.³³ Congress’ exemption is thus pivotal to helping the most at risk borrowers, including minority and low-income students – a fact that is borne out by real-world experiences with enhanced outreach to these borrowers. Historically Black Colleges and Universities, for example, have been able to reduce their student default rates through innovative outreach techniques and best practices, including increased contact with borrowers.³⁴

We also reiterated the critical role that telephone conversations play in helping student loan borrowers resolve delinquencies and avoid default. The federal student loan landscape is far more complex now than it was 25 years ago, and many distressed borrowers are not fully aware of their numerous options. There are now 16 different repayment plan options – including some that allow payments to be based on income and as low as \$0/month – and 32 forbearance and forgiveness options.³⁵

Navient is able to help borrowers resolve their delinquencies and prevent default **more than 90 percent of the time** when it has a live conversation with them.³⁶ Conversely, 90 percent of the borrowers who default on their federal student loans have never had a live conversation with Navient, despite our efforts to reach them.³⁷ Similarly, Navient’s recent test found that outreach to previously delinquent borrowers’ cell phones increased successful IDR plan enrollment **by 50**

²⁹ Am. Ass’n of Community Colleges Comments at 1 (describing student loan debt as a “serious problem for African Americans”).

³⁰ UNCF Comments at 1.

³¹ *Id.*

³² See, e.g., Navient Comments at 24; Center for Disease Control, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2015* (May 2016), <http://bit.ly/27e0RzD> (reporting that nearly 60 percent of adults living in poverty live in wireless-only households, and that Hispanic adults (59.2%) and non-Hispanic black adults (48.1%) are more likely than non-Hispanic white adults (43.2%) to live in wireless-only households).

³³ See Peter J. Mateyka, *Desire to Move and Residential Mobility: 2010-2011*, U.S. Census Bureau at 7 (2015), <http://www.census.gov/content/dam/Census/library/publications/2015/demo/p70-140.pdf>; U.S. Dep’t of Educ., *Strengthening the Student Loan System to Better Protect All Borrowers* at 16 (2015), <https://www2.ed.gov/documents/press-releases/strengthening-student-loan-system.pdf>.

³⁴ See U.S. Dep’t of Educ., *Historically Black Colleges and Universities Fact Sheet: FY 2012 3-Year Cohort Default Rates* (2015), <http://www2.ed.gov/offices/OSFAP/defaultmanagement/dmd002.html>.

³⁵ See Navient Comments at 6.

³⁶ See *id.* at 9-10.

³⁷ See *id.*

percent.³⁸ We encourage the Commission to carefully and thoughtfully consider this data and other extensive data in the record, the broad agreement among many parties regarding the benefits of these calls, federal student loan borrowers' interests, and Congress' clear intent as it adopts rules in this proceeding.

We also discussed the report recently submitted by the Department of Treasury's Bureau of the Fiscal Service ("Fiscal"), which details the results of the first year of a two-year pilot program in which it services defaulted student loan debt.³⁹ Fiscal found that this type of federal debt "is very difficult to resolve" and enumerated many of the same challenges in reaching at-risk borrowers as commenters in this proceeding.⁴⁰ For example, Fiscal explained that "speaking with a call center agent is critical to identifying and enrolling in a repayment option."⁴¹ Yet few borrowers responded to Fiscal's outreach.⁴² The response rates to its outbound calls were "extremely low."⁴³ Among other things, Fiscal's report demonstrates the need for flexibility to place more than three calls per month to borrowers and to contact individuals other than the borrower in some cases, as Navient explained in a separate *ex parte* letter.⁴⁴

Additionally, we emphasized that the circumstances regarding calls to reassigned wireless numbers are very different in this proceeding compared to those addressed in last year's *Omnibus Order*.⁴⁵ Unlike the TCPA's "prior express consent" requirement, the new exemption applies based on the purpose of a call.⁴⁶ In other words, a call is exempt from this consent requirement if its sole purpose is "to collect a debt owed to or guaranteed by the United States."⁴⁷ As others have pointed out in this proceeding, a "one-call attempt" framework for reassigned numbers would "gut the relief" that Congress intended and "be the height of unfairness" for callers.⁴⁸ The Commission must provide a "safe" path for callers to make the exemption meaningful and ensure that the possibility that a number has been reassigned does not interfere with the delivery of important, time-sensitive information to at-risk federal student loan borrowers.⁴⁹ Moreover, this is a rulemaking proceeding, whereas the *Omnibus TCPA Order* was the product of a more narrow adjudication. And parties

³⁸ See *id.* at 34.

³⁹ Fiscal, *Report on Initial Observations from the Fiscal-Federal Student Aid Pilot for Servicing Defaulted Student Loan Debt* (2016), available at <https://www.treasury.gov/connect/blog/Documents/student-loan-pilot-report-july-2016.pdf> ("Report").

⁴⁰ See *id.* at 2.

⁴¹ *Id.* at 5.

⁴² *Id.* at 5.

⁴³ *Id.* at 5.

⁴⁴ See Letter from Mark W. Brennan, Counsel, Navient, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed July 8, 2016).

⁴⁵ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, et al.*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015).

⁴⁶ See, e.g., Navient Comments at vi, 37-38; Navient Reply Comments at 18, 27-28.

⁴⁷ See *id.*; 47 U.S.C. § 227(b) (exempting calls that are "made solely to collect a debt owed to or guaranteed by the United States").

⁴⁸ See NPRM, Statement of Commissioner O'Rielly; American Financial Services Association Comments at 3.

⁴⁹ See, e.g., Navient Comments at 37-38; Navient Reply Comments at 26-28.

calling to collect a federal debt have no incentive to attempt to reach a borrower at a number they know has been reassigned.⁵⁰

Finally, the Commission's recent clarification regarding calls by or on behalf of the federal government supports the position that the Department and contractors that are its agents (and act within the scope of their agency) are not "persons" under the TCPA or otherwise subject to its requirements.⁵¹ As the Commission explained, "the TCPA does not apply to calls made by or on behalf of the federal government in the conduct of official government business, except when a call made by a contractor does not comply with the government's instructions."⁵² For example, as the Commission recognized, "the term 'person' in section 227(b)(1) does not include a contractor when acting on behalf of the federal government, as long as the contractor is acting as the government's agent in accord with the federal common law of agency."⁵³ A court would likely find, for example, that the Department's Direct Loan Program servicers act as its agents in a number of circumstances.⁵⁴

The Supreme Court's decision in *Campbell-Ewald Co. v. Gomez* also supports this position. There, the Supreme Court confirmed after Congress adopted the Bipartisan Budget Act that federal agencies and their contractors who "perform as directed" obtain certain immunity in connection with work they do pursuant to their contractual undertakings with the United States."⁵⁵ As Navient explained in our comments, the rules adopted in this proceeding can recognize this basic framework, but they cannot disturb it.

Pursuant to Section 1.1206(b) of the Commission's rules, I am filing this notice electronically in the above-referenced docket. Please contact me directly with any questions.

Respectfully submitted,

/s/ Mark W. Brennan
Mark W. Brennan
Partner
Counsel to Navient Corp.
mark.brennan@hoganlovells.com
D +1 202 637 6409

cc: Diane Cornell
Chavez Adams
Amber Lucci

⁵⁰ See, e.g., Navient Comments at 40-41; Navient Reply Comments at 26-27.

⁵¹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling, FCC 16-72 (rel. July 5, 2016); see also 47 U.S.C. § 227(b)(1).

⁵² *Id.* ¶ 11.

⁵³ *Id.* ¶ 16.

⁵⁴ Whether an agency relationship in fact exists between the Department and Direct Loan Program servicers is a matter to be determined by common law principles of agency. See, e.g., *id.* ¶¶ 16-17; see also *Dish Network, LLC v. FCC*, 552 Fed.Appx. 1 (D.C. Cir. 2014).

⁵⁵ See *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 666, 672 (2016).

Appendix A
Table of Government-Required Calls to Borrowers
CG Docket No. 02-278¹

Government Entity	Calls Required	Source	Referenced By
Department of Education	<p>Minimum: four calls in 21 days (certain IDR plan applicants).</p> <p>At least four “diligent efforts” to contact delinquent FFELP borrowers by telephone.</p> <p>Urged Congress to allow services to contact student loan borrowers on their cell phones.</p>	<p>FSA Business Operations Change Request Form 3571.</p> <p>34 C.F.R. § 682.411.</p> <p>Strengthening the Student Loan System to Better Protect All Borrowers at 16.</p>	<p>Navient Comments at 46.</p> <p>Nelnet Reply Comments at 5.</p> <p>ABA/CBA Comments at 11, 18.</p>
Fannie Mae and Freddie Mac	Minimum: one call every five days.	<p>Fannie Mae Servicing Guide at D-2-02.</p> <p>Freddie Mac Servicing Guide.</p>	<p>ABA/CBA Comments at 11, 17.</p> <p>Consumer Mortgage Coalition Comments at 8-10.</p> <p>Mortgage Bankers Assn. Reply Comments at 9.</p>
Federal Housing Administration (FHA)	Minimum: two calls per week.	FHA Single Family Housing Policy Handbook at 578-79.	<p>ABA/CBA Comments at 11, 15.</p> <p>Consumer Mortgage Coalition Comments at 6.</p> <p>Mortgage Bankers Assn. Reply Comments at 9.</p>
Home Affordable Modification Program (HAMP)	Minimum: four calls per 30 days.	MHA Handbook v. 5.1 at 76.	<p>ABA/CBA Comments at 11, 16.</p> <p>Consumer Mortgage Coalition Comments at 5.</p> <p>Mortgage Bankers Assn. reply Comments at 9.</p>

¹ All of the filings cited herein were submitted in response to the Notice of Proposed Rulemaking released by the Commission on May 6, 2016. See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Notice of Proposed Rulemaking, 31 FCC Rcd 5134 (2016).

National Mortgage Settlement	Minimum: four calls per 30 days.	National Mortgage Settlement at A-23.	ABA/CBA Comments at 11, 17.
Consumer and Financial Protection Bureau (CFPB)	Must make a “good faith effort” to establish “live contact” with borrowers within 36 days of delinquency.	12 C.F.R. § 1024.39(a).	ABA/CBA Comments at 11, 13. Mortgage Bankers Assn. Reply Comments at 9.
Interagency Task Force	Recommended that “technology-enabled communication” and text messages be used to contact borrowers.	Interagency Task Force Recommendations at 1, 9-11.	Student Loan Servicing Alliance Reply Comments at 6.
Office of the Comptroller of the Currency (OCC)	Approved bank compliance plans, which include procedures for telephone outreach to delinquent borrowers.	Foreclosure Prevention: Improving Contact with Borrowers (2007).	ABA/CBA Comments at 8, 11, 17.
State of California	Must “attempt to contact” the borrower by telephone at least three times.	Cal. Civ. Code § 2923.5 (a)(1)(A), (a)(2), (e)(2)(A).	Mortgage Bankers Assn. Reply Comments at 10.
State of Nevada	Must “attempt to contact” the borrower by telephone at least three times.	Nev. Rev. Stat. § 107.510(1)(b), (2); (5)(b).	Mortgage Bankers Assn. Reply Comments at 10.
Washington State	Must “attempt to contact” the borrower by telephone at least three times.	Wash. Rev. Code § 61.24.031 (1)(a)(i-ii), (1)(b), (5)(b)(i).	Mortgage Bankers Assn. reply Comments at 10.
Rural Housing Service (Dept. of Agriculture)	Must attempt to make verbal or written contact before 20 days past due.	HB-1-3555 SFH Guaranteed Loan Program Technical Handbook, Ch. 18.	Consumer Mortgage Coalition Comments at 7-8. Mortgage Bankers Assn. Reply Comments at 9.
Veterans Administration (VA)	Must attempt to establish live contact by the 20th day of delinquency.	38 C.F.R. § 36.4278(g)(1)(ii).	ABA/CBA Comments at 11, 16. Consumer Mortgage Coalition Comments at 6-7. Mortgage Bankers Assn. Reply Comments at 9.